

RCA Del Caribe, Inc. and Rafael Cuevas Kuinlam and Local 2333, International Brotherhood of Electrical Workers, AFL-CIO. Case 24-CA-3622

July 16, 1982

DECISION AND ORDER

On the basis of a charge filed by Rafael Cuevas Kuinlam (hereinafter the Charging Party) on June 25, 1975,¹ the General Counsel of the National Labor Relations Board, by the Regional Director for Region 24, issued a complaint against RCA del Caribe, Inc. (hereafter Respondent), on July 28. The complaint alleges that Respondent violated Section 8(a)(1), (2), and (3) of the Act by executing a new collective-bargaining agreement, containing a union-security clause, with the incumbent Union, Local 2333, International Brotherhood of Electrical Workers, AFL-CIO (hereafter IBEW), and that this agreement was executed at a time when Respondent had full knowledge of the pending petition filed by the rival union, Union Independiente de Empleados de Lineas Aereas de Puerto Rico (hereafter Union Independiente).²

Thereafter, on September 27, all parties to this proceeding entered into a stipulation of facts and of the record and on September 29 filed a motion to transfer this proceeding to the Board. The parties agreed that the stipulation of facts, with its appendixes and exhibits attached thereto, constituted the entire record in the case and that no oral testimony was necessary or desired by any of the parties. They waived a hearing before, and the making of findings of facts and conclusions of law by, an administrative law judge, and submitted the proceeding for findings of fact, conclusions of law, and an order directly to the Board. On October 7, the Board approved the stipulation and ordered the proceeding transferred to the Board. Thereafter, the General Counsel, IBEW, and Respondent filed briefs.

The Board has considered the entire record herein and the briefs and makes the following findings of fact and conclusions of law:

I. THE BUSINESS OF RESPONDENT

Respondent, RCA del Caribe, Inc., is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of Delaware, and is a subsidiary of RCA Corporation, Picture Tube Division, Lancaster, Pennsylvania. At all times material herein, Respondent has maintained an office and place of

business in the city of Barceloneta and Commonwealth of Puerto Rico, herein called Respondent's plant, where it is, and has been at all times material herein, engaged in the manufacture, sale, and distribution of electrical components for television sets and related products.

During the year ending May 30, which period is representative of its annual operations generally, Respondent, in the course and conduct of its business, purchased and caused to be transported and delivered to its Barceloneta plant goods and materials valued in excess of \$50,000, of which goods valued in excess of \$50,000 were transported and delivered to its plant in interstate commerce directly from points located outside the Commonwealth of Puerto Rico. During the same period, Respondent shipped manufactured electrical components valued in excess of \$50,000 from its plant in Barceloneta directly to plants of said Picture Tube Division located in Marion, Indiana, and Scranton, Pennsylvania. The parties stipulated, and we find, that Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

The parties stipulated, and we find, that IBEW and Union Independiente each are, and at all material times have been, labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Stipulated Facts

Since on or about April 30, 1971, Respondent has recognized IBEW as the exclusive representative of a unit consisting of Respondent's hourly paid production and maintenance employees at its Barceloneta plant.³ Pursuant to such recognition, Respondent and IBEW executed a collective-bargaining agreement effective from April 30, 1971, until February 1, 1972, which was thereafter renewed, as amended, for a period effective from January 8, 1972, until January 2, 1975.

Beginning sometime during the month of November 1974, Respondent and IBEW commenced negotiations for a new collective-bargaining agreement to succeed the contract which was to expire on January 2. The negotiations continued until January 8, at which time IBEW submitted Respondent's final offer to the unit employees, who subse-

¹ All dates herein are in 1975 unless otherwise noted.

² The complaint was amended in the stipulation by agreement of all parties to include the 8(a)(3) allegation.

³ The unit description excluded all executive, administrative, and professional employees, plant clerical and office clerical employees, salaried technical employees, cafeteria employees, watchmen, guards, and supervisors as defined in Sec. 2(11) of the Act.

quently rejected the offer. Thereafter, beginning on or about January 9, unit employees engaged in a strike authorized by IBEW in support of IBEW's bargaining demands. As discussed hereafter, the strike ended on February 26.

On January 27, Union Independiente filed a petition for certification of representative,⁴ which petition is still pending, seeking to represent Respondent's production and maintenance employees. On or about January 27, Respondent and IBEW were served with copies of that petition. In view of the pendency of the petition filed by Union Independiente, Respondent refused to recognize or negotiate with IBEW. Consequently, on February 24, IBEW submitted to Respondent separate sheets signed by 157 unit employees, a majority of the 227 bargaining unit employees, which authorized IBEW to continue to represent the employees as their collective-bargaining representative. These authorization sheets were signed between February 17 and 24; as the parties stipulated, the signatures were affixed voluntarily and obtained without coercion or other unlawful means. On February 24, Respondent determined that the signatures of the 157 employees were bona fide after comparing them with the employees' signatures in its records. In addition, on or about February 23, a petition was also signed by approximately 157 unit employees requesting the National Labor Relations Board to dismiss the representation petition in Case 24-RC-5555 and reaffirming the desire of such employees for IBEW to continue as their exclusive bargaining representative.⁵ On February 24, Respondent determined that the signatures on the petition were also bona fide by comparing the signatures with the employees' signatures in its records. On February 25, upon IBEW's request, Respondent agreed to the resumption of negotiations for a new collective-bargaining agreement, and, on February 26, Respondent and IBEW executed a new collective-bargaining agreement to succeed the 1972-75 agreement, which agreement, *inter alia*, retained the union-security clause in the prior agreement and provided for employee wage increases.

B. Discussion and Conclusion

The General Counsel contends that, by executing its current contract with IBEW with full knowledge of the representation petition filed by Union Independiente, Respondent violated the requirement established in *Midwest Piping and Supply Co., Inc.*, that an employer maintain strict neutrality in the face of competing representational

claims.⁶ The General Counsel argues that, by its conduct, Respondent rendered unlawful assistance to IBEW in violation of Section 8(a)(1) and (2) of the Act and that it also violated Section 8(a)(3) of the Act because the executed agreement contains a union-security clause.

Respondent, with IBEW in agreement, claims that it was not obligated to refrain from recognizing IBEW because the mere filing of the representation petition by Union Independiente did not raise a "real question concerning representation," as required under *Midwest Piping*, *supra*. It argues that, when an employer, as Respondent did herein, recognizes a union after verifying the union's card-based majority and then executes a collective-bargaining agreement with that majority representative, an employer does not violate the Act. In support of its position, Respondent points to several circuit court decisions rejecting the Board's *Midwest Piping* doctrine.⁷

In this and a companion case, *Abraham Grossman d/b/a Bruckner Nursing Home*, 262 NLRB No. 115 (1982), we endeavor today to redefine the Board's longstanding *Midwest Piping* doctrine. In *Bruckner*, we set forth a new policy with respect to the requirements of employer neutrality in rival union initial organizing situations. In this case, we shall reexamine the law applicable to situations wherein an incumbent union is challenged by an "outside" union.

While the Board had initially held that the continued negotiation of a contract after the filing of a representation petition was not a violation of Section 8(a)(2) of the Act within the meaning of *Midwest Piping*,⁸ it reversed itself in *Shea Chemical Corporation*⁹ and held that an employer faced with a pending petition from an outside union must cease bargaining with the incumbent and maintain a posture of strict neutrality with respect to both the incumbent and the challenging labor organization, until such time as one or the other had been certified following a Board-conducted election.¹⁰ As in the *Midwest Piping* initial organizing cases,¹¹

⁶ 63 NLRB 1060 (1945).

⁷ E.g., *N.L.R.B. v. Inter-Island Resorts, Ltd., d/b/a Kona Surf Hotel, and ILWU Local 142*, 507 F.2d 411 (9th Cir. 1974), cert. denied 422 U.S. 1042 (1975); *Playskool, Inc. v. N.L.R.B.*, 477 F.2d 66 (7th Cir. 1973); *Suburban Transit Corp. and H.A.M.L. Corporation v. N.L.R.B.*, 499 F.2d 78 (3d Cir. 1974), cert. denied 419 U.S. 1089; *American Bread Company v. N.L.R.B.*, 11 F.2d 147 (6th Cir. 1969); *Iowa Beef Packers, Inc. v. N.L.R.B.*, 331 F.2d 176 (8th Cir. 1964); *District 50, United Mine Workers of America [Pittsburgh Valve Company, et al.] v. N.L.R.B.*, 234 F.2d 565 (4th Cir. 1956).

⁸ *William D. Gibson Co., Division of Associated Spring Corporation*, 110 NLRB 660 (1954).

⁹ 121 NLRB 1027 (1958).

¹⁰ *Id.* at 1029.

¹¹ See *Bruckner Nursing Home*, *supra*.

⁴ Case 24-RC-5555.

⁵ The parties stipulated that these signatures were also obtained voluntarily, without the use of coercion or other unlawful means.

the reasons for requiring strict employer neutrality and a Board-conducted election in the incumbent setting have been the Board's concern that employees should have the greatest possible freedom in the selection and, in cases of this tenor, retention of their collective-bargaining representatives. To this end, the Board has held that the continued negotiation of a contract with an incumbent union in the face of a validly supported petition was not the conduct of a neutral employer. The Board did, however, provide that the incumbent could still process grievances and otherwise act as the exclusive representative of employees in the unit involved. The Board felt that within these guidelines an outside union challenging the incumbent would have the opportunity to make its case to the unit employees in an atmosphere as free as possible from the influence of the incumbent's dealings with the employer.

As the *Midwest Piping* doctrine has been applied over the years in cases involving rivalries between incumbent and outside labor organizations, it has become increasingly evident that the Board's efforts to promote employee free choice have been at a price to the stability of collective-bargaining relationships. In particular, the *Shea Chemical* adaptation of *Midwest Piping* has failed to accord incumbency the advantages which in nonrival situations the Board has encouraged in the interest of industrial stability. The recognition of the special status of an incumbent union indicates a judgment that, having once achieved the mantle of exclusive bargaining representative, a union ought not to be deterred from its representative functions even though its majority status is under challenge. The Board has accordingly developed the doctrine of the presumption of continuing majority status in order to give a majority representative (either recognized or certified) some reasonable degree of insulation and freedom to fulfill its mandate from employees in its dealings with the employer.

Because *Midwest Piping* focused on a legitimate concern for preserving the right of employees to change their bargaining representative, the Act's concern for stability in collective-bargaining relationships embodied in the doctrine of the presumption of continuing majority status was not given its due. While the filing of a valid petition may raise a doubt as to majority status, the filing, in and of itself, should not overcome the strong presumption in favor of the continuing majority status of the incumbent and should not serve to strip it of the advantages and authority it could otherwise legitimately claim.

We have concluded that requiring an employer to withdraw from bargaining after a petition has

been filed is not the best means of assuring employer neutrality, thereby facilitating employee free choice. Unlike initial organizing situations, an employer in an existing collective-bargaining relationship cannot observe strict neutrality. In many situations, as here, the incumbent challenged by an outside union is in the process of—perhaps close to completing—negotiation of a contract when the petition is filed. If an employer continues to bargain, employees may perceive a preference for the incumbent union, whether or not the employer holds that preference. On the other hand, if an employer withdraws from bargaining, particularly when agreement is imminent, this withdrawal may more emphatically signal repudiation of the incumbent and preference for the rival. Again, it may be of little practical consequence to the employees whether the employer actually intended this signal or was compelled by law to withdraw from bargaining. We further recognize that an employer may be faced with changing economic circumstances which could require immediate response and commensurate changes in working conditions. Put another way, the ebb and flow of economic conditions cannot be expected to subside merely because a representation petition has been filed. Thus, to prohibit negotiations until the Board has ruled on the results of a new election might work an undue hardship on employers, unions, and employees. Under the circumstances, we believe preservation of the status quo through an employer's continued bargaining with an incumbent is the better way to approximate employer neutrality.

For the foregoing reasons, we have determined that the mere filing of a representation petition by an outside, challenging union will no longer require or permit an employer to withdraw from bargaining or executing a contract with an incumbent union.¹² Under this rule, an employer will not violate Section 8(a)(2) by postpetition negotiations or execution of a contract with an incumbent, but an employer will violate Section 8(a)(5) by withdrawing from bargaining based solely on the fact that a petition has been filed by an outside union.¹³

This new approach affords maximum protection to the complementary statutory policies of furthering stability in industrial relations and of insuring employee free choice. It should be clear that our new rule does not have the effect of insulating incumbent unions from a legitimate outside chal-

¹² We hereby overrule *Shea Chemical*, *supra*, to the extent it is inconsistent with this Decision and Order.

¹³ Of course, this rule will not preclude an employer from withdrawing recognition in good faith based on other objective considerations. See, e.g., *United States Gypsum Company*, 157 NLRB 652 (1966); *Laysan Manufacturing Co.*, 151 NLRB 1482 (1965); *Celanese Corporation of America*, 95 NLRB 664 (1951).

lenge. As before, a timely filed petition will put an incumbent to the test of demonstrating that it still is the majority choice for exclusive bargaining representative. Unlike before, however, even though a valid petition has been filed, an incumbent will retain its earned right to demonstrate its effectiveness as a representative at the bargaining table. An outside union and its employee supporters will now be required to take their incumbent opponent as they find it—as the previously elected majority representative.¹⁴ Consequently, in the ensuing election, employees will no longer be presented with a distorted choice between an incumbent artificially deprived of the attributes of its office and a rival union artificially placed on an equal footing with the incumbent.

Although some courts of appeals have suggested that an employer could extinguish the question concerning representation raised by the filing of a petition merely by satisfying itself that it was still negotiating with a majority representative,¹⁵ as Respondent here did, we emphasize that the Board will continue to process valid petitions timely filed by outside unions and to conduct the election as expeditiously as possible. To do otherwise would make the difficult task of unseating an incumbent almost impossible, and would too often have the further effect of making the filing of a petition during the "open period" a nullity. If the incumbent prevails in the election held, any contract executed with the incumbent will be valid and binding. If the challenging union prevails, however, any contract executed with the incumbent will be null and void.

Applying these principles to the instant case, we find that, while Union Independiente filed a valid petition during the open period, Respondent's continued negotiations and execution of a contract with the incumbent IBEW were not violations of the Act within the meaning of Section 8(a)(2).¹⁶ Accordingly, we shall dismiss the complaint in its entirety.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Re-

lations Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

CHAIRMAN VAN DE WATER, dissenting:

I respectfully disagree with the majority's dismissal of the complaint in this case. I would find that Respondent, by recognizing and executing a collective-bargaining agreement with IBEW at a time when a question concerning representation of its employees existed, violated Section 8(a)(2) of the Act. Given the majority's rejection of the *Midwest Piping* doctrine¹⁷ in this case, I believe some explanation of my adherence to the doctrine is warranted.

The Board's *Midwest Piping* doctrine obligates an employer, where two or more labor organizations have filed representation petitions, to refrain from recognizing either one until the question concerning the representation of its employees, raised by the competing representational claims, is settled through Board processes. In such circumstances, the Board is vested with the exclusive power to resolve the question concerning representation "by permitting employees freely to select their bargaining representatives by secret ballot." *Midwest Piping*, 63 NLRB at 1070.¹⁸

The *raison d'être* of the *Midwest Piping* doctrine is to secure and protect the Section 7 rights of employees. Section 7 of the Act guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing . . . and . . . the right to refrain from any or all such activities." To further these rights, the Act in Section 8(a)(1) provides sanctions against employer interference with the exercise of these rights, and in Section 8(a)(2) proscribes employer domination or interference with the formation or administration of any labor organization. The Act is thus designed to insure that employees freely choose their bargaining representative and that the bargaining representative so designated is the free choice of a majority of employees. This purpose is frustrated by an employer's recognition of a labor organization whose majority status is unsettled or challenged.

The majority expresses concern that the *Midwest Piping* doctrine applied in cases involving rivalries between incumbent and outside labor organizations has failed to promote another statutorily mandated

¹⁴ Chairman Van de Water, in his dissent, treats an incumbent union as nothing more than "one of the claimants to majority status." He ignores the plain fact that the incumbent is the claimant whose majority status has been demonstrated, and that the Board presumes that majority status to continue in the absence of objective factors indicating its loss.

¹⁵ See, e.g., *District 50, UMW v. N.L.R.B.*, *supra*; *N.L.R.B. v. Indianapolis Newspapers, Inc.*, 230 F.2d 501 (7th Cir. 1954); *N.L.R.B. v. Standard Steel Spring Co.*, 180 F.2d 942 (6th Cir. 1950).

¹⁶ In reaching this conclusion, we did not rely on the fact that valid authorization sheets were submitted by IBEW since we do not believe an incumbent union is required to reaffirm its status after a petition has been filed.

¹⁷ *Midwest Piping and Supply Co., Inc.*, 63 NLRB 1060 (1945).

¹⁸ In subsequent cases, the Board removed the requirement that a representation petition actually be filed. For the reasons stated in *Abraham Grossman d/b/a Bruckner Nursing Home*, 262 NLRB 855 (1982), I would require the filing of a petition to trigger an employer's obligation of neutrality when confronted by competing claims of incumbent and challenger unions, as well as in initial organizing situations involving two or more unions.

interest—that of furthering stability in industrial relations. Clearly, the Act does not immunize an incumbent from challenges to its representative—or majority—status by employees or another labor organization. Moreover, the Act envisions that the stability of labor relations also depends on the employees' right to proceed with a secret-ballot election to choose their majority representative. In *Linden Lumber Division, Summer & Co. v. N.L.R.B.*, 419 U.S. 301, 307 (1974), the Supreme Court stated, "In terms of getting on with the problems of inaugurating regimes of industrial peace, the policy of encouraging secret elections under the Act is favored."

In reaching this conclusion, the Supreme Court took into account that the Board processes a representation petition with dispatch.¹⁹ The requirement in *Midwest Piping* that an employer faced with competing representational claims must remain neutral until the employees resolve the representational question through a Board-conducted election does not prejudice any party. The only effect of this requirement is a minimal delay in selecting the bargaining representative—a delay which the Supreme Court has found to be compatible with the goal of stable industrial relations. Furthermore, the conclusiveness of election results reinforces stability in labor relations²⁰ at the same time it furthers employee rights which are at the heart of the Act.

On the other hand, to require an employer and an incumbent union to continue bargaining in the face of competing representational claims would tend to lock employees into a situation which they might prefer to change and indeed have a right to change.²¹ It is axiomatic that "once an employer has conferred recognition on a particular organization it has a marked advantage over any other in securing the adherence of employees, and hence in preventing the recognition of any other." *N.L.R.B. v. Pennsylvania Greyhound Lines, Inc., et al.*, 303 U.S. 261, 267 (1938). It may well be that an employer which has been a party to an ongoing bargaining relationship would prefer the predictability

and continuity of a bargaining relationship with the incumbent labor organization rather than the uncertainty of a successful challenger. No one can gainsay an employer's obvious ability to influence employees in their choice of a bargaining representative no matter how directly or indirectly the employer communicates its preference.²² Recognition by an employer also affords the chosen bargaining representative "a deceptive cloak of authority" which can be used to elicit additional employee support. *International Ladies' Garment Workers' Union, AFL-CIO [Bernhard-Altmann Texas Corporation] v. N.L.R.B.*, 366 U.S. 731, 736 (1961). By such employer interference, the selection process of a bargaining representative is no longer reserved to employees, as the Act intended and provided, but instead is tainted by the employer's choice and ability to influence employees in matters that concern their employment.

Further, the fact that an incumbent union is one of the claimants to majority status is all the more reason to impose the requirement of neutrality.²³ For an incumbent bargaining representative enjoys certain inherent advantages over an outside challenger. An incumbent, through its stewards and other organizational representatives, is present in the plant, involved in the day-to-day workplace and worklives of the employees. It is also reasonable to presume that an incumbent has a legitimacy in the eyes of the employees by the very fact that the employer recognizes it and deals with it as the employees' bargaining representative. Thus, an incumbent enjoys an accessibility to employees and a visibility which are not similarly available to a challenger.

It is conceivable that an employer may prefer to displace the incumbent union. In that circumstance, by engaging in either lawful hard bargaining or unlawful surface bargaining, the employer might

¹⁹ In its decision, the Supreme Court cited the fact that it takes only 45 days to process a representation petition. *Linden Lumber*, 419 U.S. at 306-307. It should be noted that it was reported in the Board's Forty-Fifth Annual Report that the processing time in fiscal year 1980 was approximately 38 days.

²⁰ The majority herein and some courts have, to the contrary, suggested that stability in labor relations is undermined and that bargaining relationships are disrupted by application of the *Midwest Piping* doctrine. See, e.g., *N.L.R.B. v. Peter Paul, Inc.*, 467 F.2d 700 (9th Cir. 1972), and *N.L.R.B. v. Swift and Company*, 254 F.2d 285 (3d Cir. 1961). In my judgment, their assessments are incorrect. Further, I believe their approach fails to consider the fact that Congress provided that a Board election be the sole forum for deciding the question concerning representation raised by a petition, and ignores *Linden Lumber's* admonition that elections are the favored means for resolving such questions.

²¹ *St. Louis Independent Packing Company, a Division of Swift & Company*, 129 NLRB 622, 629 (1960), enf'd. 291 F.2d 700 (7th Cir. 1961).

²² The majority concedes the possibility that employees may perceive a preference for the incumbent if the employer continues to bargain with the incumbent after a representation petition has been filed. They opine, however, that, if the employer withdraws from bargaining, the employees may perceive this as repudiation of the incumbent and preference for the rival, even though the withdrawal was compelled by law. I, frankly, fail to follow this reasoning. It is more likely the employees would perceive that the law is jealously guarding their right to select a bargaining representative, and that their employer was complying with this law. As a clarification to employees the Board can modify the language of the "Notice of Election" to explain that Board law requires the temporary suspension of bargaining pending the employees' decision regarding which labor organization will represent them.

²³ As I have noted, an incumbent has neither an intrinsic nor an immutable claim to representative or majority status merely because it is the incumbent. However, nothing said herein is intended to imply that I would alter the principle that an incumbent bargaining representative, when there are no challenges to its status, is presumed to have a continued majority status for purposes of collective bargaining, or the fact that, where there are challengers for the representative status, an incumbent can assert for new election purposes a representational claim because of its previous majority status.

cause the employees to become disenchanted with the incumbent. Thus, the advantages normally enjoyed by the incumbent could be erased, and the employees' choice could be subtly influenced in favor of the outside union. Equally, an employer may wish to retain the current union relationship in the face of a challenge by a rival union which the employer may consider a more powerful or effective employee representative—resulting in the employer's giving up a past hard bargaining stance to gain employee favoritism for the incumbent as a means toward foreseeable longer term employer gain. Hence, the majority's allowance of continuing incumbent bargaining after a rival petition has been filed, whether or not the incumbent is able to secure a majority of signatures requesting continuance of bargaining, places the employer in a position to maneuver employee sentiments.

There are other practical considerations as well for imposing a requirement of neutrality while a question concerning representation is being resolved. Obviously, an incumbent union's bargaining leverage is limited when a substantial number of employees have indicated a desire to be represented by a rival union. And, an employer who doubts the incumbent's majority status and who does not have a preference between the competing unions may well hesitate to conclude an agreement with the incumbent for fear of later learning that it must bargain with another union. Thus, there may be a negligible chance of progress in bargaining. In these circumstances, such bargaining would be an exercise in futility for both parties, the results of which would be frustration, waste of time, and division of energy between bargaining and campaigning. Predictably, the denouement would be lengthy and costly 8(a)(5) litigation²⁴—which could be of no conceivable benefit to the employer, the union, or the employees. Such a potential group of scenarios, I believe, should be avoided.

In sum, here, when Union Independiente filed its petition with the Board and Respondent was made aware of that fact, it knew or should have known that it was faced with rival claims which raised a real question concerning representation and which required that Respondent remain strictly neutral until the matter was resolved by the Board. Instead, Respondent, by recognizing and executing a collective-bargaining agreement with IBEW, chose to make a determination as to which of the rival claimants actually represented a majority of the unit employees. By this action, Respondent arrogated to itself a function which, under the statutory

scheme, is this Board's responsibility to perform, and thereby violated Section 8(a)(2) of the Act.

MEMBER JENKINS, dissenting:

I join with Chairman Van de Water in disagreeing with the majority's needless reversal of the *Midwest Piping* doctrine²⁵ of strict employer neutrality in favor of requiring employers to negotiate (and contract) with an incumbent union after a valid rival petition is filed but before employees have chosen their bargaining agent. This new policy will have the effect of converting a representation election into a ratification vote, and, instead of enhancing stability of collective bargaining, as the majority argues, I believe it will merely enlarge employers' potential for influencing such elections, exploiting the differing self-interests of unions and employees, and dictating the terms of such preelection collective-bargaining agreements.²⁶ I agree with the cogent statutory and practical considerations enumerated by the Chairman in support of the Board's time-honored and still sound *Midwest Piping* doctrine, and I would stress that these opportunities for wrongdoing created by the majority's new formulation are far outweighed by the perhaps slight gap in bargaining which could occur during the expedited processing of the election petition.²⁷ Moreover, these issues arise in a representation context and are more swiftly resolved through representation elections than the more protracted unfair labor practice proceeding.

While I share the majority's concerns for the Board's unsuccessful enforcement efforts in the courts, I believe we can resolve that through fine tuning of *Midwest Piping* rather than their resorting to a major overhaul. It is true that in some instances we have applied the doctrine in too mechanistic a fashion; however, the only basic weakness which I perceive has been our failure to define clearly what is required by way of employee support to warrant finding that a real question concerning representation exists. We have made it clear that a representational claim cannot be lacking in substance, but we have failed to define just what constitutes a substantial claim. It is our error of regarding even *de minimis* support for a compet-

²⁵ *Midwest Piping and Supply Co., Inc.*, 63 NLRB 1060 (1945).

²⁶ We need look no further than the instant facts to envision how voters may be under extraordinary economic pressure to vote for ratification of the contract, and thereby for the incumbent, irrespective of their longer term needs for greater benefits or choice of a different bargaining representative.

²⁷ In incumbent situations there would likely be no need for a hearing since the election would ordinarily be conducted in a unit coextensive with the previously recognized (or certified) contractual unit, and the matters of timeliness and adequacy of the showing of interest would be accomplished on the basis of an administrative investigation.

²⁴ One might argue, in light of the above examples, that the Board rule requiring such phantom bargaining during the pendency of the question concerning representation could be the cause of the 8(a)(5) litigation.

ing union as sufficient to halt the bargaining relationship which has caused the courts to reject our views. That problem can be solved simply by requiring substantial employee support for the rival union before we would proceed to conduct a Board election. I propose a 15-percent showing of employee support for a rival union as the requirement for holding such an election. For, I view a 15-percent showing in a two-union contest as approximately equivalent to the Board's current 30-percent administrative requirement (for elections involving a single union), based on my observation of the frequency of dual cards and the presence of some hardcore opponents of any union in the usual employee complement. Such a solution would be both reasonable and consistent from a policy stand-

point and it would insure that both competing unions had genuine employee support warranting the conclusion that a real question concerning representation exists.

An expedited election before bargaining occurs, reflecting uncoerced majority support for the bargaining agent, is obviously preferable to permitting the employer and one of the competing unions to begin a relationship *before* the employees themselves have spoken with a clear and free voice. This procedure would more quickly resolve the issue of free employee choice, undercut the propensity for violating the *Midwest Piping* requirements of neutrality, and perhaps reduce the frequency of unfair labor practice cases such as this one.